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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 23, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Pruitt:

The Texas Commission on Environmental Quality ("TCEQ") is grateful that your administration is willing to work with the States rather than against them. And, the State of Texas is particularly grateful for the opportunity to provide a revision to its State Implementation Plan ("SIP") to address outstanding Federal Clean Air Act requirements for Best Available Retrofit Technology ("BART") and visibility transport. I understand that a federal district judge has asked for additional information regarding the timing of that SIP revision. This letter provides that information.

As indicated in the August 14 Memorandum of Agreement between TCEQ and the U.S. Environmental Protection Agency ("EPA"), TCEQ will propose a SIP revision and associated rulemaking no later than March 31, 2018. This is an aggressive timeline by any measure. Historically, the process for proposing a SIP revision has taken up to 48 months or even longer. Here, TCEQ has committed to doing it in less than 7. That means that in less than 7 months, TCEQ will complete all of the technical work associated with the BART SIP (*e.g.*, creating budgets for a new trading program and demonstrating the lawfulness of those budgets), draft the rules for that new trading program, draft the SIP narrative, conduct informational meetings with environmental groups, citizen groups, electricity generators, and electric grid operators, and conduct all of the legal and management reviews required by state and federal law.

The March 31, 2018 deadline for proposing this SIP revision is particularly aggressive because the TCEQ-EPA MOA also commits both agencies to "parallel processing." That means almost immediately after TCEQ proposes its SIP revision, EPA will begin its regulatory process for approving it. The upside of that procedure is that it creates regulatory certainty much faster than the traditional SIP-revision process. The downside is that the final SIP must closely match the proposed one. As a consequence, TCEQ will be forced to severely front-load its regulatory work on this rule and have it all but done by the time the SIP revision is proposed in March.

Proposing this SIP revision in less than 7 months (as opposed to 48 or more) is a significant lift. For example, Texas's 2009 SIP revisions for the Regional Haze Rule took more than 7 *years* to finalize and over 5 *years* just to propose. EPA started by designating five Regional Planning Organizations to assist with the coordination and cooperation needed to address visibility and haze issues. Texas was assigned to the Central Regional Air Planning Association ("CENRAP"). In 2002, Texas started working with CENRAP on several aspects in developing the Texas regional haze plan including the development of a common emissions inventory of pollutants that can impact visibility. These emissions were then used in conjunction with meteorological inputs and chemical reaction calculations in complex photochemical models to estimate pollutant concentrations and impacts across a wide geographic area. The pollutant concentrations could then be converted to estimated visibility impairment impacts. In addition, the determination of visibility impairment due to natural conditions and determining the

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estimated timeline for Texas areas to reach natural visibility conditions is a time consuming and complex task. The TCEQ then had to evaluate what additional controls might be possible, the anticipated cost, and the visibility benefit of those potential controls. The TCEQ held SIP-related consultation meetings and invited participation from federal land managers for the Texas Class I areas as well as federal land managers in surrounding states Class I areas, tribes in Texas and adjacent states, other surrounding states that may have an impact on Texas Class I areas, and the EPA. This process, beginning with initial internal meetings on developing a rulemaking for BART in July 2005 to the commission considering proposal of the Regional Haze SIP in December 2007, took roughly 29 months. Again, Texas has committed to proposing this BART SIP in less than 7.

That timeline is made still more aggressive by the fact that TCEQ and EPA have committed to implementing BART through a trading program. Historically, it takes much longer than 7 months to set up a trading program because it requires an enormous amount of work to identify program participants, requirements and restrictions on who can and who must participate, emission allowances, rules for trading or selling allowances, life of allowances, use of allowances, contingency requirements, reporting and compliance requirements, penalty requirements, and tracking mechanisms. For example, TCEQ is in the process of implementing a trading program for the Area and Mobile Source Credit Generation Rule ("AMSCGR"). It took TCEQ 17 months to propose the AMSCGR trading program. During that time, TCEQ conducted numerous meetings with EPA, the Environmental Defense Fund, industry representatives, and other representatives from groups such as the port authority and other governmental entities. This collaboration resulted in the development of a draft strategy and paved the way for staff to begin work on a rule proposal, a database contract to develop tracking mechanisms, and procedures for ensuring that the credits satisfy federal law—in particular, that the credits are real, surplus, permanent, enforceable, and quantifiable.

Likewise, it took TCEQ 17 months to propose the Highly Reactive Volatile Organic Compound Emissions Cap and Trade ("HECT") Program. To implement that program, TCEQ used information from an intensive study that included more than two hundred scientists working on ozone and other pollution issues. That study alone took a year to complete.

Proposing a statewide trading program to satisfy the Regional Haze BART requirements is, if anything, even more complicated and difficult. It is only because you have committed to working with us and because the State has committed the full weight of its resources to this issue that I am confident we can propose a SIP revision on the virtually unprecedented timeline specified in our MOA.

In addition to the technical and administrative work that must be done to propose a SIP revision and rule, there are also public review periods and notice and comment requirements that must be met in accordance with state and federal law to finalize a SIP. (An addendum summarizing the relevant state law requirements for the SIP revision is attached.) Under state law, TCEQ must provide at least seven days for public notice prior to commission consideration of any issue. For any revision to the SIP, the state is also required to provide at least 30 days for the public to review and comment. TCEQ must then compile, summarize, and respond to all comments received and make any necessary revisions to SIP based on those comments. Depending on comments, additional technical work may also be required. The work associated with this research, response to comments, and subsequent review process for the adoption packet has historically taken approximately 4 months after the 30-day comment period closes. These documents must then go before the commission again, with an additional seven-day notice, for final approval before submittal to the EPA. This entire process, which is designed to ensure adequate opportunity for public input and internal development and review, routinely takes 12

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months and in some cases more than 4.5 years, depending on the complexity of the subject. In this case, however, TCEQ has committed to finalizing the proposed rule within 7 months of proposing it. Again, for something as big and complicated as a statewide Regional Haze BART trading program, that is breakneck speed.

Finally, I would like to emphasize why TCEQ has committed to such an aggressive timetable for proposing and finalizing this SIP revision. TCEQ has done so because the Clean Air Act envisions a process of cooperative federalism where your agency and mine work together to promote clean air in a lawful and responsible way. TCEQ also agreed to the August 14 MOA because it wants to set an example for the nation of how cooperative federalism can work and to correct some of the mistakes that have been made in the past. TCEQ did *not* sign the MOA because it thinks the absence of Regional Haze BART rules constitutes an emergency. As you know, the Fifth Circuit recently stayed and remanded the reasonable progress part of the Regional Haze Rule, so as of today, it is not even clear what are the appropriate targets for restoring natural visibility by 2064. What is clear is that Texas is *already* below the glide path that was previously established by EPA. TCEQ is confident that, if our agencies cooperate on this SIP revision, we can make even better strides in more efficient ways.

We again congratulate you on your approach to these regulatory matters. And we trust that this information is responsive to the judge's question. If I or my office can be of further assistance, please do not hesitate to contact me. TCEQ looks forward to working with you on this and many other matters in the years to come.

Sincerely,



Bryan W. Shaw, Ph.D., P.E.
Chairman
Texas Commission on Environmental Quality

Enclosure

Addendum: Texas Legal Requirements for Proposal and Adoption of Rules

The Texas Commission on Environmental Quality (“TCEQ”) is an Executive Agency of the State of Texas subject to the procedural rulemaking requirements of the Texas Administrative Procedure Act (Texas APA)¹ in addition to other general requirements for rulemaking found in its enabling authority.² In adopting rules that are intended to address the requirements of the Federal Clean Air Act (“FCAA”), 42 U.S.C. §§7401 - 7515, States are also required to meet similar federal requirements, including requirements for public notice, public hearing, response to comment and other procedural submission requirements.³

The Texas APA requires the TCEQ to meet specific requirements for public input prior to adoption of a rule. Texas agencies are required to give at least 30 days’ notice of their intention to adopt a rule before it adopts the rule, and is required to file notice of the proposed rule with the Secretary of State for publication in the Texas Register.⁴ The Texas APA requires specific public notice of the proposed rules including a brief explanation of the proposed rule, the text of the proposed rule prepared in a manner to indicate any words to be added or deleted from the current text,⁵ a statement of statutory authority or other authority for the proposed rule and the statutory provision affected by the proposed rule, a fiscal analysis assessing the anticipated implementation cost of the proposed rule for state and local government for each year of the first five years that the rule will be in effect, a statement regarding public benefits and costs of compliance for the public for each year of the first five years the rule will be in effect, a request for public comment on the proposed rule and any other statement required by law.⁶ Additionally, separate regulatory analyses regarding local employment impact statements,⁷ major environmental rules,⁸ and takings impacts⁹ and are also required, if applicable. TCEQ is also required to hold a public hearing on proposed rules.¹⁰ The notice of proposed rulemaking is required to provide an opportunity for the public to submit comment on the proposed rules for consideration by the commission prior to any adoption of the rules.¹¹

Texas agencies are required to provide an explanation of the proposed rule that is sufficient to apprise the public of the rule’s purpose. Although not required in the proposal, the TCEQ regularly includes, as part of the brief explanation of the rule, a statement of the rule’s factual basis or reasons for the rule. This information is beneficial in assisting both the commission and the public in understanding the proposed rule in addition to facilitating the development of the rule’s reasoned justification required for rule adoption. The required statement of authority is a concise explanation of the particular statutory provision of law that authorizes the agency to adopt the rule. Also, the agency must identify that portion of its enabling statute or other provision of law that the proposed rule is intended to implement.

The Texas Third Court of Appeals has held that section 2006.002 of the Government Code requires agencies to conduct an analysis in a proposed rule’s preamble to determine whether the rule will have an adverse economic effect on small businesses.¹² If a rule may have an adverse

¹ Tex. Gov’t Code, §§ 2001.021-2001.041.

² Tex. Health & Safety Code, §382.017; Tex. Water Code, §5.103.

³ Federal Clean Air Act (FCAA), 42 U.S.C. §7410(a)(1)-(2); 40 C.F.R. §§51.100 - 51.105.

⁴ Tex. Gov’t Code, §2001.023.

⁵ Tex. Gov’t Code, § 2002.014.

⁶ Tex. Gov’t Code, §2001.024.

⁷ Tex. Gov’t Code, §2001.022.

⁸ Tex. Gov’t Code, §2001.0225.

⁹ Tex. Gov’t Code, §2001.043.

¹⁰ Tex. Gov’t Code, §2001.029, Tex. Health & Safety Code, §382.017 and 40 C.F.R. §51.102.

¹¹ Tex. Gov’t Code, §2001.029, Tex. Health & Safety Code, §382.017, Tex. Water Code, §5.103.

¹² *Unified Loans, Inc. v. Pettijohn*, 955 S.W.2d 649, 654 (Tex. App.—Austin, 1997, no pet.); see also Tex. Gov’t Code, §2006.002.

economic effect on these businesses, an agency must prepare and include in the proposed rule an economic impact statement, as described in the provision, and a regulatory flexibility analysis, that includes alternative methods of achieving the purpose of the rule to lessen the effect on small or micro-businesses. Also, a copy of the proposed rule that is submitted to the Texas Register must be provided to the Senate and House standing committees that are charged with reviewing the proposed rule.¹³

An agency may not adopt a proposed rule sooner than 30 days or later than six months after it is published in the Texas Register.¹⁴ A proposed rule is automatically withdrawn six months after its publication in the Texas Register if the agency does not publish an order adopting or withdrawing the rule before that time.¹⁵ Texas agencies must consider fully all written and oral submissions concerning the proposed rule.¹⁶ The agency order adopting a rule must include a reasoned justification of the rule, a statement of the authority under which the rule is adopted, and a legal certification.¹⁷ The agency's justification must explain "how and why it reached the conclusions it did."¹⁸ The agency must present its justification "in a relatively clear, precise, and logical fashion."¹⁹ The justification must include: 1) a summary of comments received from parties interested in the rule that shows the names of interested groups or associations offering comment on the rule and whether they were for or against its adoption; 2) a summary of the factual basis for the rule as adopted that demonstrates a rational connection between the factual basis for the rule and the rule as adopted; and 3) the reasons why the agency disagrees with party submissions and proposals.²⁰ After the commission approves the order adopting a rule, the adopted rule text is forwarded to the Secretary of State for publication in the Texas Register.²¹ Adopted rules are effective 20 days after they are filed with the Secretary of State.²²

For rules concerning requirements specified in the Federal Clean Air Act, such as the regional haze and interstate visibility transport, including best available control technology, States must also meet similar public notice, comment, hearing and submission requirements.²³

¹³ Tex. Gov't Code, § 2001.024(a)(3)(C).

¹⁴ Tex. Gov't Code, §§ 2001.023, .027.

¹⁵ Tex. Gov't Code, § 2001.027.

¹⁶ Tex. Gov't Code, §§ 2001.029(c), .033.

¹⁷ Tex. Gov't Code, § 2001.033.

¹⁸ *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996)

¹⁹ *Id.* at 669; *Lambright v. Tex. Parks & Wildlife Dep't*, 157 S.W.3d 499, 504-05 (Tex. App.—Austin 2005, no pet.).

²⁰ Tex. Gov't Code, §2001.033(a)(1).

²¹ Tex. Gov't Code, §2001.036.

²² Tex. Gov't Code, §2001.036.

²³ FCAA, 42 U.S.C. §7410(a)(1) and (2); 40 C.F.R. §§51.100 - 51.105.